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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1166

EARLE T. COOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DONALD P. ALWIN
39 South La Salle Street
Chicago, Illinois 60603
(312) AN 3-6651

Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Earle T. Cook, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 25, 1970.

OPINIONS BELOW

The judgment of conviction and sentence of the United States District Court for the Northern District of Illinois is not officially reported. (A copy of the judgment is attached as Appendix "A"). The opinion of the United

States Court of Appeals for the Seventh Circuit entered September 25, 1970, has not yet been officially reported. It is attached to this Petition as Appendix "B."

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence was entered on September 25, 1970. (A copy of the judgment of the Court of Appeals is attached as Appendix "C"). A Petition for Rehearing En Banc was timely filed* and was denied on November 25, 1970. (A copy of the order denying the petition is attached as Appendix "D"). The jurisdiction of this Court is invoked under and pursuant 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the seizure of a vise not described in the search warrant from petitioner's home violated the controlling rule of *Marron* v. *United States* that in the conduct of a search pursuant to a warrant nothing is left to the discretion of the officer executing the warrant.

2. Whether under Rule 16(a)(2) of the Federal Rules of Criminal Procedure petitioner was entitled to discovery of the results and reports of scientific tests and experiments, and whether the trial court's denial of his motion for production of the same resulted in a denial of petitioner's Sixth Amendment right to confront the witnesses against him.

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*Petitioner applied for and was granted an extension of time to file his Petition for a Rehearing.

3. Whether the "totality syndrome" relied upon by the lower court equally supports the conclusion that petitioner was denied the effective assistance of counsel as to pretrial discovery, and whether therefore the case should be remanded for a factual determination as to whether petitioner consciously abandoned his request for pretrial discovery, or, whether he was denied the effective assistance of counsel.

4. Whether where prospective jurors have been exposed to potentially prejudicial publicity about the case, the trial court should interrogate each juror who indicates he has read about the case, individually and out of the presence of the other venairemen, to determine exactly what each such juror has heard about the case, and thus allow an objective determination as to whether probable prejudice exists.

5. Whether petitioner is entitled to a hearing in the trial court to determine the existence and legality of electronic eavesdropping where the prosecutor equivocally states that there has been no *illegal* eavesdropping but refuses to disclose whether conversations of petitioner were eavesdropped.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense."

Rule 16 (a) (2) of the Federal Rules of Criminal Procedure:

> (a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government . . .

STATEMENT

Petitioner Earle T. Cook was charged in a two count indictment with violating 18 U.S.C. Sec. 32 by placing a destructive device on a civil aircraft with intent to damage the aircraft (Count I) and with causing damage to a civil aircraft (Count II). Judgment of conviction on each count was entered upon a jury verdict of guilty and petitioner was committed to the custody of the Attorney General of the United States for concurrent terms of twenty years on each count. (R. 45)*

On November 12, 1967, Petitioner drove his wife to O'Hare Airport in Chicago where she boarded a 727 jet flight for San Diego, California, to visit her parents and convalesce from an operation. Somewhere over Colorado

a bomb exploded in the baggage compartment of the plane, depressurizing the aircraft, but the flight proceeded without further mishap to San Diego.

Three pieces of luggage in the baggage compartment were destroyed by the blast, leaving three loose baggage straps. Two of the straps were matched to the baggage claim checks of persons on the plane. The third strap (numbered HO 1-65-33) was determined to have been attached to the bag which contained the bomb.

F.B.I. Agents commenced an immediate investigation, interviewing passengers and members of their families. From petitioner's wife, who had claimed all of her luggage, agents obtained two baggage claim checks. (numbered HO 1-65-34 and HO 1-64-02). The numbers were not in sequence, and one of them (HO 1-65-34) was next in sequence to the number of the bomb bag.

Skycap Walter Scott at O'Hare Airport remembered that he had checked two bags for Cook on the morning of the flight. He identified his handwriting on two of the straps ('33 and '34), one of which was found in the plane and the other obtained from petitioner's wife, and at the trial a handwriting expert testified that the handwriting was Scott's. Another skycap checked a third bag for petitioner and identified the writing on the stub ('02) as his. The F.B.I. handwriting expert testified that the writing on the stub and strap was Smith's.

Petitioner, who had been once interviewed by F.B.I. Agents on November 14, 1967, was again visited by Agents on November 17, 1967, and asked to accompany

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"R" refers to the common law record in the trial court.

them to the F.B.I. office in Chicago, which he did. At the conclusion of the interview, during which petitioner made damaging denials and contradictions, petitioner was driven back to the Coca Cola plant in St. Charles, Illinois, of which he was plant manager, where he was placed under arrest.

Meanwhile, while the interview was in progress, other Agents obtained a search warrant and conducted a search of his home, where they removed, among other things, pieces of wire, electrical items, and a vise. The wire and electrical items were specifically described, but the warrant did not specifically authorize seizure of the vise nor did it generically refer to tools or instruments used to assemble or manufacture a bomb. It did, however, authorize seizure of "other instrumentalities" used in violation of the statute. (A. 5-6, R. 15, p. 50)* A motion prior to trial to suppress the items seized from petitioner's home, including the vise, was denied. (R. 25).

The items removed from Cook's home, along with parts of the bomb found on the plane, were taken to the F.B.I. Laboratory in Washington, D.C., where they were subjected to fiber analysis, metallurgical tests, spectrographic analysis, tool mark examination and other scientific tests by F.B.I. Laboratory experts who later testified at the trial. According to the F.B.I. expert on instrument analysis, who conducted spectographic examination of wires and other items, the metal and plastic components of certain wires found on the plane were the same as wires found in Cook's home, and particles found on the bell of the clock contained in the bomb matched par-

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*"A" refers to the Appendix filed by petitioner in the Court of Appeals.

ticles found on the vise removed from petitioner's basement. (A. 46-48; Tr. 703-34)*

An F.B.I. metallurgist testified that he had compared pieces of wire found in petitioner's home with pieces of wire found on the plane and concluded that they were made by the same manufacturer. (A. 50; Tr. 777-805).

An expert in the field of fiber analysis testified that the fiber components of a wire found on the plane and a wire from petitioner's home were the same in color, construction and microscopic appearance. (A. 50-51; Tr. 806-813).

Finally, an F.B.I. explosives and tool mark expert testified that he had conducted a series of scientific tests on items found on the plane and in petitioner's home and concluded that the marks on the bell of clock used in the bomb showed that the bell had been flattened in petitioner's vise to the exclusion of all other tools. (A. 41-45; Tr. 622-678).

Admitted for the purpose of showing motive only, was the testimony of two witnesses who testified that petitioner had earlier made approaches to them in attempts to arrange for his wife to be killed.

Also admitted was an F.B.I. agent's testimony as to the interview with petitioner on November 17, 1967.

Petitioner's request that the government disclose any eavesdropping of petitioner was denied, the government taking a position characterized by the Court of Appeals as "not unequivocal." (App. B, p.) On appeal, the government submitted a letter from the Department of Justice stating that petitioner was not the subject of di-

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*Tr. refers to the transcript of proceedings in the trial court.

rect microphone surveillance nor were any of his conversations monitored. (Brief for Appellee, pp. 92-93).

Petitioner testified on his own behalf and admitted that he had taken his wife to the airport on November 12, 1967, but said he checked only two bags. He emphatically denied that he had ever attempted to kill his wife and denied that he made the bomb and placed it on the plane. Petitioner's wife testified that he had been a good and kind husband who had never threatened her, and, when she became critically ill six months before the date of the offense charged, had insisted that she go to the best available hospital where she was cured.

REASONS FOR GRANTING THE WRIT

1. The Judgment And Opinion Of The Lower Court Is Directly Contrary To The Rule Of *Marron* v. *United States* That The Particularity Requirement Of The Fourth Amendment Leaves Nothing To The Discretion Of The Officer Executing a Search Warrant.

Petitioner respectfully submits that the writ should be granted because the decision of the lower court sustaining seizure and removal from petitioner's house of a vise is in direct conflict with the controlling constitutional principle that where a warrant is obtained describing the things to be seized ". . . nothing is left to the discretion of the officer executing the warrant." (*Marron* v. *United States*, 275 U.S. 192, 197).

The search warrant issued for the search of petitioner's home authorized the seizure of numerous items which were particularly described—i.e., items similar to the component parts of the bomb. Nothing was said about articles or tools used to manufacture the bomb. The

warrant concluded with the phrase ". . . other instrumentalities which are designed and intended for use and/or which have been used as a means of committing offenses in violation of . . ." the statute under which petitioner was charged. (R. 16, p. 49)

The Rule of *Marron* v. *United States* Is Directly Applicable Here

Petitioner argued to the Court below and now urges to this Court that this case is directly controlled by the decision of this Court in *Marron* v. *United States*, 275 U.S. 192 (1927). In *Marron* this Court held that the seizure of certain items not described in the warrant could not be sustained under the warrant,* saying in language directly applicable here:

> "The requirements that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*" (emphasis supplied). *Marron* v. *United States*, 275 U.S. 192, 197.

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*Compare the warrant in *James* v. *United States*, 416 F. 2d 467 (5th Cir. 1969), heavily relied upon by the government below but not cited by the lower court, where the warrant called for ". . . machine equipment, machine tools and hand tools for the manufacture of gambling paraphernalia . . ." (416 F. 2d at 473).

*The seizure of unspecified items in *Marron* was sustained as a search incident to a valid arrest, a circumstance not present here because the search of petitioner's residence was not conducted incident to his arrest.

Clearly in the instant case the seizure of tools and indeed the determination of what "other instrumentalities" were to be seized was a matter left to the discretion of the officers executing the warrant. As much is conceded by the government in its argument to the lower court that it had on hand an explosives expert to determine what items were to be taken. (Brief for Appellee, p. 49).

It is no answer to contend that the term "other instrumentalities" sufficed to describe with sufficient particularity the vise which was seized. This is refuted in a reading of the warrant itself which in no way specifies tools or items used to manufacture the bomb but is limited wholly to items which resembled the component parts of the bomb. Where tools or items of manufacture are to be seized the same are at least generically described in the warrant—a circumstance conspicuously absent from the instant case. Compare *James* v. *United States*, 416 F. 2d 467, 473 (5th Cir. 1969).

Equally obvious is the fact that the vise and other tools seized were not ". . . as precisely identified . . . as the nature of the activity permitted." (*James* v. *United States*, 416 F. 2d 467, 473). Surely here the agents did not comply with the requirement that the agent describe " . . . the generic class of items he is seeking" (*James* v. *United States*, 416 F. 2d 467, 473).

Nor can it be contended that all items seized other than the vise were described with all possible particularity. True, as the lower court observed, the agents " . . . could not have known what particular tools might have been used in assembling the component parts of the explosive device" (App. B22), but of decisive significance here is that the warrant did not call for the seizure of "tools" at all. Surely the catchall phrase "instrumentali-

tion" cannot be held to include all items which, *after seizure*, are found to be related to the offense or to the purpose of the warrant.

Simply stated, therefore, it is abundantly clear in the instant case that too much was left to the discretion of the agents and that the seizure of the vise directly violated the rule of *Marron* that ". . . nothing is left to the discretion of the officer executing the warrant." (*Marron* v. *United States*, 275 U.S. 192, 196).

The Issue Posed By Seizure Of The Undescribed Vise Transcends The Particular Facts of This Case.

Were the issue posed above thus so easily resolved, no doubt the lower court would have, as it is here contended it should have, held the seizure unjustified under the *Marron* rule. Urged to the lower court by the government, however, was an argument that the principle of *Marron* had been eroded and undermined by the subsequent decision of this Court in *Harris* v. *United States*, 331 U.S. 145 (1947) and by various decisions of the several Courts of Appeals.* (Brief for Appellee, pp. 52-61).

Petitioner respectfully submits however that *Marron* has maintained its vitality in the eyes of this Court and that, in view of the apparent position of the government and certain of the lower courts that *Marron* has been eroded, certiorari should be granted to reaffirm the position in *Marron* in an analysis of the issue which would far transcend the merits of this case. Review of the

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*Cases principally relied upon by the government are: *United States* v. *Old Dominion Warehouse, Inc.*, 10 F. 2d 726 (2nd Cir. 1926); *Benton* v. *United States*, 70 F. 2d 24 (4th Cir. 1934); *cert. den.* 292 U.S. 642; *Johnson* v. *United States*, 293 F. 2d 53 (D.C. Cir. 1961), *cert. den.* 375 U.S. 888.

Marron doctrine in the context of this case is warranted for several reasons.

1. While this Court has not rendered many decisions on the particularity requirement of the Fourth Amendment, it has consistently approved the principle stated in *Marron*. In *Stanford* v. *Texas*, 379 U.S. 476 (1965), this Court held a State warrant to be in violation of the Fourth Amendment particularity requirement and quoted and relied upon the above-quoted passage from *Marron*. (*Stanford* v. *Texas*, 379 U.S. 476, 485). Similarly, in *Berger* v. *United States*, 338 U.S. 41 (1967), this Court quoted the same passage with approval. (338 U.S. at 58). And in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), the most recent case in which the particularity requirement was before the Court, Justices Stewart, Brennan and White in their concurring opinion described the *Marron* rule as " . . . the controlling constitutional principle." (*Stanley* v. *Georgia*, 394 U.S. 557, 571). Thus, far from having been abandoned or undermined by subsequent decisions of the Court, *Marron* is still very much the controlling rule and should not have been ignored by the lower court.

2. The recent decision of this Court in *Chimel* v. *California*, 395 U.S. 752 (1969), overruling *Harris* v. *United States*, 331 U.S. 145 (1947), calls into serious question the contention of the government below that "*Harris* has modified the strict holding of *Marron*." (Brief for Appellee, p. 59). Indeed, reexamination by this Court in *Chimel* of the principles governing the scope of a search incident to an arrest suggests that this Court should undertake similar reexamination and restatement of the particularity requirement as stated in *Marron*. In a word, *Marron* should be reaffirmed and the judgment of the lower court reversed, or, *Marron* should be overruled.

3. Not without significance in this context is the failure of the lower court to even cite or refer to *Marron* in rejecting petitioner's contention that seizure of the vise was unauthorized. Of equal significance is failure of the lower court to adopt and follow the reasoning of the government that *Marron* had been modified. Clearly the position taken by the lower courts on the particularity requirement have been far from consistent* and review and analysis by this Court of the issue as here presented is warranted.

2. The Writ Should Be Granted To Decide The Novel And Important Question Of Whether A Defendant In A Criminal Case Is Entitled As A Matter Of Right To Discovery Of The Results And Reports Of Scientific Tests And Experiments Under Rule 16(a)(2) Of The Federal Rules of Criminal Procedure And Whether Denial Of Such Request Under Certain Circumstances Constitutes A Violation Of The Confrontation Clause Of The Sixth Amendment.

Petitioner respectfully requests this Court consider and decide the significant and novel question of whether

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*In *Chimel*, apropos the issue of a search incident to an arrest, this Court observed that the ". . . decisions . . . [on] that question have been far from consistent, as even the most cursory review makes evident." (*Chimel* v. *California*, 395 U.S. 752, 755) Similar inconsistency between the decision of this Court in *Marnon* and *Stanford* v. *Texas* and the decisions of the lower courts suggests that review and analysis of the issue here presented by this case is warranted. E.g. *United States* v. *Old Dominion Warehouse, Inc.*, 10 F. 2d 736 (2nd Cir. 1926); *Benton* v. *United States*, 70 F. 2d 24 (4th Cir. 1934), *cert. den.* 292 U.S. 642; *Johnson* v. *United States*, 293 F. 2d 530 (D.C. Cir. 1961), *cert. den.* 375 U.S. 888.

a defendant in a criminal case is entitled to production of the results and reports of scientific tests and experiments when requested pursuant to Rule 16(a)(2) of the Federal Rules of Criminal Procedure. This question, arising in the posture of the instant case, presents this Court with an issue of first impression in this Court—namely the scope of the trial court's discretion under Rule 16 of the Federal Rules of Criminal Procedure. It is petitioner's contention that the trial court's denial of his request for discovery predicated upon Rule 16(a)(2) was prejudicial and reversible error resulting in ". . . trial from ambush." (*State* v. *Eads*, 166 N.W. 2d 766, 773) (Iowa Sup. Ct. 1969).

Prior to trial counsel for petitioner moved for production of the results and reports of scientific and laboratory tests and experiments performed on items which the government intended to use as evidence at the trial and for permission to inspect the same.

The government opposed this motion, urging to the court an argument that under Rule 16(a) defendant was required to make a showing of materiality and relevancy. In support of its argument, the government cited and relied upon a portion of the advisory committee notes quite obviously intended as applicable only to Subdivision (b) of the Rule and not, as urged, to Subdivision (a).

Although the trial court granted petitioner's request for leave to inspect the physical items of evidence, petitioner's motion for production of the scientific and laboratory tests were denied "without prejudice."

It is petitioner's contention that the denial of defendant's request for production of the scientific and laboratory tests violated the spirit and the letter of Rule 16 (a)(2) of the Federal Rules of Criminal Procedure. Rule

16 was amended in 1966 to accord to defendant's in a criminal case broader discovery. Although certain of the lower courts have held, correctly, that discovery under Rule 16(a) must be accorded defendant as a matter of right, this Court has never rendered a decision interpreting and applying Rule 16(a). As evidenced by the actions of both the government and the trial court below, a decision by this Court is needed and would indeed advance the understanding and application of Rule 16(a) by District Courts.

The Importance of Pretrial Production of Scientific Evidence

The importance and significance of pretrial discovery of scientific evidence in the hands of the government should be recognized by this Court as it has been by some of the lower federal and State courts, which have held that failure to accord such discovery results in "trial from ambush." *United States* v. *Kelley*, 420 F. 2d 36 (2nd Cir. 1969); *State* v. *Kads*, 166 N.E. 2d 766 (Iowa Sup. Ct. 1969). As observed by the Supreme Court of Iowa with respect to pretrial production of F.B.I. scientific reports in murder case:

> "The need to examine such reports before trial is all the more urgent because they are invariably based on highly technical findings and are presented by well-qualified experts. Failure to afford defendant a reasonable pre-trial opportunity to meet such evidence by a cross-examination based on adequate factual background, by producing his own experts, or by some other means, results indeed in what has been called "trial from ambush." *State* v. *Thompson*, 54 Wash. 2d 100, 338 P. 2d 319, 324. Here again, as noted in Division II, the reasons usually advanced in op-

position to discovery do not apply. F.B.I. reports cannot be changed by allowing defendant to see them; and the twin specters of perjury and intimidation have no place in considering what the proper rule should be." *State* v. *Kads*, 166 N.W. 766, 773

This observation can provoke little controversy.

The Need For A Decision As To Application Of Rule 16(a)(2)

Rule 16(a)(2) provides that the trial court *may* order production of the results and reports of scientific tests and experiments. While semantically implying discretion, certain of the lower Courts have held, correctly, that, absent a government request for a protective order under subdivision (e) of Rule 16, the trial court is without discretion to deny a proper request for discovery pursuant to Rule 16(a). *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968). Indeed, the Seventh Circuit has held that there is no discretion to deny a request for production of a defendant's "statements" (Rule 16(a)(1)) *United States* v. *Isa*, 413 F. 2d 244 (7th Cir. 1969). Similar reasoning of necessity must apply to the results and reports of scientific test and experiments. (Rule 16(a)(2).

This issue, squarely presented to the Court of Appeals and again to this Court by this petition, was avoided by the lower court's factual determination that petitioner somehow "abandoned" his right to pretrial discovery of the material requested. Central to the lower court's position is the fact that the trial court denied petitioner's motion for discovery "without prejudice."

The lower court clearly ignored the question which is here presented to this Court as one of first impression, namely, whether defendant was entitled to the discovery requested as a matter of right—for if as contended pe-

titioner was entitled to such discovery as a matter of right, the trial court was without discretion to deny the motion—with or without "prejudice." Directly apropos is the decision of this Court in the closely related context of production of evidence favorable to the accused:

> "We now hold that the suppression by the prosecution by evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution." (emphasis supplied). *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963).

Accordingly, the rationale of *Brady* v. *Maryland* requires production of the material requested below "upon request" and the trial court was without discretion to enter the kind of order it entered—an order which resulted in the pretrial denial to defendant of the reports of the government's scientific experts.

This court should therefore grant the writ to determine whether the initial order of the trial court denying to defendant the right to inspect and copy the government's scientific reports violated Rule 16(a)(2).

Denial Of The Right To Confront Witnesses

Incident to and related to denial of petitioner's right to discovery under Rule 16(a)(2) is the corresponding denial, particularly where as here the government's evidence is in the main complex and scientific, of the right to confront witnesses. Without the pretrial discovery requested, counsel could under no circumstances adequately cross examine the government's expert witnesses. As observed by the Iowa Supreme Court in *State* v. *Eads*:

> "The defendant, *of course*, has the right to cross-examine the witnesses who testify regarding the manner in which such evidence incriminates him. How can he adequately do so without pre-trial preparation? How does he meet that testimony, usually from an expert witness, by a spur-of-the-moment cross-examination? Laymon v. State, Okl. Cr., 355 P. 2d 444, 448." *State* v. *Eads*, 166 N.W. 766, 771

To the same effect is the observation of the American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating To Discovery And Procedure Before Trial*, Sec. 2.1 (iv), (May, 1969). The commentary to this section (providing for pretrial discovery of the reports of medical and other experts) in as follows:

> "Reports of medical and other experts (Sec. 2.1(a) (iv). The need for full and fair disclosure is especially apparent with respect to scientific proof and the testimony of experts. This sort of evidence is practically impossible for the adversary to test or rebut at trial without an advance opportunity to examine it closely. Examples of the critical importance of evidence are legion. See e.g. Pruitt v. State, 270 P. 2d 351 (Okla. Crim. 1954). And it is virtually impossible for evidence or information of this kind to be distorted or misused because of its advance disclosure." *Standards Relating To Discovery And Procedure Before Trial*, p. 67

Accordingly this Court should consider and decide not only whether the trial court's denial of discovery denied to defendant a right provided for by Rule 16(a)(2) of the Federal Rules of Criminal Procedure, but whether he was likewise denied his Sixth Amendment right to confrontation of witnesses.

2. Because The Totality Syndrome Relied Upon By The Lower Court Equally Supports The Conclusion That Petitioner Was Denied The Effective Assistance Of Counsel, The Judgment Of The Lower Court Should Be Reversed Or In The Alternative Vacated And The Case Remanded For A Factual Determination As To Whether Petitioner Consciously Waived His Discovery Rights Or Whether Petitioner Was Denied The Effective Assistance Of Counsel.

Petitioner respectfully submits that the various elements of the totality syndrome relied upon by the lower court do not compel or for that matter even adequately support the lower court's essentially factual determination that petitioner consciously waived any right to pretrial discovery of the results and reports of scientific experiments performed by the government, but rather support a different conclusion—namely, that petitioner was denied effective assistance of counsel. Accordingly, petitioner respectfully requests that this Court reverse the judgment of the lower court or in the alternative summarily vacate and remand the same for further remand to the trial court for a determination of the issues of fact raised in the first instance in the appellate court and decided adversely to petitioner.

This request is premised upon the well recognized principles that appellate courts do not sit as triers of fact, particularly where as here the Constitutional rights of petitioner are in issue, and that there is a presumption against waiver of fundamental rights by defendants. *Glasser* v. *United States*, 315 U.S. 60, 70 (1941).

There Was No Affirmative Waiver of Petitioner's Discovery Rights

While it is perhaps obvious from a reading of the opinion, the point is made that there was no affirmative "waiv-

er" by petitioner of his discovery rights. Absent such a waiver, which could have been easily covered by inquiry by the court as to whether petitioner was in fact, as concluded by the lower court in a factual determination necessary to its resolution of the issue, abandoning his request for discovery which had been denied "without prejudice," waiver should not be presumed. Inquiry by the trial court would have been particularly appropriate if, as concluded by the Court of Appeals, the trial court's order was in fact an "implicit invitation" (App. B-8) to renew the motion. Indeed, failure of the trial court to raise the subject again supports petitioner's contention that the conclusion of the lower court was erroneous.

Significantly, the absence of an explicit waiver supports the contention that there was none and none should be presumed where as here the facts are in balance. As stated by this Court in *Glasser* v. *United States*, 315 U.S. 60 (1941):

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against waiver of fundamental rights."
>
> *Glasser* v. *United States*, 315 U.S. 60, 70.

Moreover, this Court has held that waiver of fundamental constitutional rights is not to be presumed from a "silent record." *Carnley* v. *Cochran*, 369 U.S. 506 (1962)

The Record Supports The Conclusion That Petitioner Was Denied The Effective Assistance Of Counsel

While it was not initially contended on appeal that petitioner was denied the effective assistance of counsel, petitioner was compelled to raise this issue in his petition for a rehearing and to again present this issue in seeking

review by this Court because of the position taken by the lower court. In almost inviting this argument, the lower court reasoned, in support of its conclusion, that petitioner ". . . *through his counsel* obviously appears consciously to have chosen not to litigate this particular issue further and indeed to make nothing further of the application." (emphasis supplied) (App. B-13) On the page previous to the page containing the above statement, the Court of Appeals candidly observed:

> "We cannot conceive that competent counsel could not have obtained and taken with him a scientific expert in the general fields involved . . ." (footnote omitted) (App. B-12)

This comment suggests that review of the competency of trial counsel in the context of the facts relative to petitioner's discovery motion is appropriate.

Necessary to an understanding of this argument is a brief review of the factors comprising what the lower court termed the "totality syndrome" and which are listed in footnote 5 of the opinion. (B-15)* A failure to cite supporting authority for petitioner's request for pretrial discovery, failure to respond to the government's objections and failure to point out incorrect statements of law therein, all equally support the conclusion that counsel for petitioner was incompetent, for they are equally explainable by concluding that counsel was ignorant of the applicable law. And, as recently observed by the Fifth Circuit, counsel's effectiveness is to be measured in part ". . . by the attorney's familiarity . . . with the law of the case." (*Hollingshead* v. *Wainwright*, 423 F. 2d 1059, 1060).

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*These factors are reviewed in greater detail than is appropriate or permissible here in petitioner's Petition For A Rehearing En Banc, pp. 3-18.

Lending particular support to the contention that trial counsel was ignorant of the law involved, particularly Rule 16 of the Federal Rules of Criminal Procedure, is the fact that his motion was not explicitly premised upon Rule 16, but was initially characterized as a Rule 16 motion by the government. (A. 4-5; R. 9, 16)

Moreover, if petitioner was abandoning his request at this pretrial stage of the proceedings, *prior to ruling on the motion*, why would he not simply say so and withdraw the motion?

Failure to bring experts with him to inspect the physical evidence equally supports, and, in the circumstances of this case calls for, the conclusion that trial counsel was not competent. This is supported by the lower court's own statement that "[w]e cannot conceive that competent counsel could not have obtained . . . a scientific expert . . ." (App. B-12)

Failure to raise the issue later, to renew the motion, to object to the scientific testimony or to raise the issue by way of a motion for a new trial are likewise equally explainable by ignorance of counsel. Indeed, once ignorance of counsel is recognized as an explanation for failure to pursue the issue—a fact most compellingly supported by the point made above—failure to take subsequent action is fully understandable, and the lower court's pyramiding of additional factors to be included in the totality syndrome is meaningless.

Failure to call experts of his own is of course most reasonably attributed to the inability to anticipate the detailed and technical nature of the testimony by the government's experts. (See *State* v. *Eads*, 166 N.W. 766, 773) Moreover, failure to call appropriate witnesses, particularly where as here it exists along with other factors, is a

relevant circumstance properly supporting an allegation of incompetency of trial counsel. *White* v. *Regan*, 324 U.S. 760 (1945).

Reliance on counsel's final argument that the expert testimony proved nothing similarly hardly supports the conclusion of a "conscious determination" to abandon the discovery issue. At this point, the issue was no longer viable and counsel was compelled to argue the facts before the jury and nothing else. Moreover, it has been held that a position taken during final argument does not constitute a "tactical waiver" of an earlier taken inconsistent position. *People* v. *Tidwell*, 89 Cal. Rptr. 58, 60 (Cal. Sup. Ct. 1970).

Entirely irrelevant to this issue is counsel's subsequent conduct of the trial, for a defendant in a criminal case is entitled to the effective assistance of counsel at ". . . every step in the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932) Particularly in the instant case, where the government's evidence at trial was largely scientific, counsel's effectiveness at trial in rebutting the government's evidence was to be determined largely by whether or not he was able to obtain discovery of the scientific reports. For example, failure to obtain the reports undermined counsel's effectiveness in cross-examining government witnesses. (*See State* v. *Eads*, 166 N.W. 766, 773). Accordingly, the record, implying the conclusion that trial counsel was ignorant of the law involved, supports the contention that petitioner was denied the effective assistance of counsel at a critical stage of the proceeding.

The Case Should Be Remanded To The Trial Court For A Hearing On The Issue Presented

Petitioner submits that in view of the fact that the record equally supports the conclusion that trial counsel was incompetent in his conduct of the pretrial discovery proceedings, a hearing by the trial court is appropriate to determine the factual issue determined by the lower appellate court. At such a hearing of course petitioner and his trial counsel could each greatly add to the record relied upon by the lower court—particularly in view of its conclusion that there was a "conscious" waiver of rights. Appropriate here is the procedure used in the eavesdropping cases where the judgment of conviction is vacated pending a determination of the factual issues involved. *E.g. Alderman* v. *United States*, 394 U.S. 165 (1969). Following such a determination, the trial court could either reinstate the judgment of conviction or order a new trial, depending upon the results of the hearing.

Petitioner's request is consistent with and dictated by the approach taken by this Court with reference to factual issues. As stated in the opinion announcing the judgment of the Court in *Giles* v. *Maryland*, 376 U.S. 66 (1967):

> "But it is not our place to decide these issues, either for or against petitioners; we need only determine that the evidence raises an issue of sufficient substance to justify remanding this case for reconsideration rather than deciding the broader constitutional question."
>
> *Giles* v. *Maryland*, 376 U.S. 66, 70 (1967)

More importantly in the context of the facts of this case, the lower court itself indicated that the trial judge would have been in the best position to have judged the

prejudicial effect of the lack of discovery. (App. B-14) Is it not also true that the trial judge is the proper court to determine whether or not there was a "conscious" waiver of petitioner's pretrial discovery rights, or whether, as here contended, failure to pursue the issue resulted from incompetence of trial counsel?

For the foregoing reasons, if this Court does not grant the petition for the reasons advanced elsewhere herein, it is respectfully requested that the judgment of the Court of Appeals be reversed, or in the alternative vacated, with instructions to vacate the judgment of conviction and remand the case to the trial court for a determination of the issues of fact raised herein.

4. This Case Presents An Important Issue As To The Duty Of The Trial Court During Voir Dire To Ascertain The Existence Of The Nature And Extent Of The Probability Of Prejudice Where Some Potential Jurors Admit To Exposure To Potentially Prejudicial Pretrial Publicity.

Petitioner respectfully submits that failure of the trial court, after learning on *voir dire* that certain jurors had heard of the case through the newspapers and thus possibly been exposed to potentially prejudicial pretrial publicity, to interrogate these jurors individually, out of the presence of each other and out of the presence of the remainder of the panel, as to the nature and extent of exposure to potentially prejudicial publicity, presents an important and substantial question which should be decided by this Court in the exercise of its supervisory powers over the administration of justice in the federal courts. (*Marshall* v. *United States*, 360 U.S. 310 (1959))

During *voir dire* several potential jurors indicated that they had heard of the case or they had read about the case in the newspapers. (Tr. 28-29, 44, 45, 49)* Without inquiring into what the jurors had read, and without conducting an interrogation of each juror who indicated he had some knowledge of the case, out of the presence of the remaining veniremen, the trial court obtained from each juror who indicated some exposure to publicity his assurance that what he had read would have no effect on his verdict and that he would be a fair and impartial juror. Four of the veniremen who admitted to some prior knowledge of the case sat on the jury which returned the verdict of guilty.

The publicity to which the potential jurors could have been exposed included major newspaper articles, appearing at the time of petitioner's arrest (less than three months prior to trial) in all four major Chicago newspapers, reciting the fact of petitioner's arrest, referring to his alleged previous attempts to kill his wife, and referring to evidence found in petitioner's home which connected him to the bomb. Newspapers gave the F.B.I. as their source of information. (See Petitioner's exhibits H-V). One of the stories, which related that agents went through petitioner's home and found what they said were "components for a time bomb which identically matched those found in the plane" attributed the information to F.B.I. Director Hoover. (Petitioner's exhibit C). Another story inaccurately reported that a baggage claim check obtained from petitioner's wife matched the tag attached to the bomb bag. (Petitioner's exhibit F).

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*Transcript of Proceedings, Jan. 29 and 30, 1967.

Given this posture of the case, petitioner respectfully submits that the trial court was required to: a) conduct an individual interrogation, out of the presence of all other veniremen, of each potential juror who indicated he had some prior knowledge of the case; and, b) inquire into the nature and degree of exposure.

The Necessity for Individual Interrogation of Exposed Jurors

The necessity for individual interrogation of veniremen who indicate exposure to potentially prejudicial pretrial publicity, or for that matter who indicate having any knowledge of the case, predicated upon the reluctance of jurors to admit to potential bias in the presence of each other, was recognized by this Court in *Irwin* v. *Dowd*, where Mr. Justice Clark, speaking for a unanimous Court said:

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration in the presence of one's fellows is often its father." *Irwin* v. *Dowd*, 366 U.S. 717, 718.

Based upon the recognition of this proposition by this Court in *Irwin* v. *Dowd* and upon similar recognition of the same principle by various Courts of Appeals (Eg. *United States* v. *Accardo*, 298 F. 2d 133, 7th Cir., 1962; *Coppedge* v. *United States*, 272 F. 2d 504 (D.C. Cir. 1959) *cert. den.* 368 U.S. 855 (1961), the American Bar Association Project on Minimum Standards For Criminal Justice promulgated the following standard governing *voir dire*, which petitioner urges this Court adopt as a uniform rule governing all federal trials:

> "Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. . ." American Bar Association Project On Minimum Standards For Criminal Justice, *Standards Relating To Fair Trial And Free Press* (herein cited "*ABA Standards*"), Sec. 3, 4 (a).

The facts of the instant case present a needed opportunity for review of the procedures to be followed on *voir dire*, not considered by this court since promulgation of the *ABA Standards*, and for application of the foregoing standard, which in the context of these facts presents an issue which far transcends the merits of this case. Thus applied to the facts of this case, the judgment of conviction should be reversed.

Failure To Inquire Into The Nature And Extent of Exposure

To enable the Court to determine whether a juror may be impartial, it is not sufficient for the court, as did the trial court below, to limit its inquiry to the juror's own opinion as to what his state of mind is. The court must make an objective determination of impartiality and such a determination turns ". . . not only on the juror's testimony as to his state of mind but also on the *nature and degree of his exposure*." (emphasis supplied) (*ABA Standards*, p. 134) The same standard quoted above, providing for individual interrogation of prospective jurors, also provides that:

> ". . . The questioning shall be conducted for the purpose of determining what the prospective juror has

> read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have." *ABA Standards*, Sec. 3.4(a).

Applying the *ABA Standards* to a recent trial, the Court of Appeals for the Ninth Circuit found the *voir dire* insufficient where as here there was no inquiry into what information the potential jurors possessed. In reversing, the court said:

> "The trial court made no effort to ascertain *what* information the jurors had accumulated and, consequently, had no way of objectively assessing the impact caused by this pretrial knowledge on the juror's impartiality." (emphasis the court's).
> *Silverthorne* v. *United States*, 400 F. 2d 627, 638.

Only by ascertaining *what* information the veniremen has been exposed to can the court make an objective determination, necessary to obtaining a fair and impartial jury, as to whether a particular juror will be biased. Absent such a determination, the court can only rely upon each juror's ". . . own assessment of his self-righteousness." (*United States* v. *Largo*, 346 F. 2d 253, 257 (Swygert, J., dissenting).

The Importance of The Question

The importance of the question here presented—namely the proper procedure to be followed where a trial court becomes aware that certain veniremen have been exposed to potentially prejudicial pretrial publicity—cannot be gainsaid. In an era of ever increasing effectiveness of mass media, the existence of juror bias predicated upon pretrial exposure to the facts of a particular case is al-

ways present, particularly where, as here, the offense charged involved an element of sensationalism. *See Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

In view of the recent publication of the *ABA Standards*, and the *Report of the Committee on The Operation of the Jury System on the "Free Press-Fair Trial" issue*, 45 F.R.D. 391, an opinion by this Court on the issues raised by the facts of this case is appropriate to future federal trials.

It is no answer to suggest, as will probably be suggested by the government, that the point raised herein was "waived" by failure of trial counsel to object to the *voir dire* as conducted or to request individual interrogation of jurors. Failure to preserve an issue has not prevented review by this Court where there exists a substantial and important question to be determined. Indeed, this Court has seen fit to decide issues not raised by either party (*E.g. Mapp v. Ohio*, 367 U.S. 643) and to grant certiorari notwithstanding a confession of error by the Solicitor General. (*E.g. Bruton v. United States*, 391 U.S. 123) In the instant case, the existence and importance of the question presented warrants granting of the writ notwithstanding failure of trial counsel to make the proper requests—a factor which may perhaps affect this Court's ultimate decision on the merits herein but which should not prevent granting of the writ to consider and decide the substantial and important issues here presented.

Moreover, failure of trial counsel to object to the *voir dire* or to request individual interrogation of jurors, regarded as a ground for rejection of petitioner's contentions with respect to *voir dire* by the lower court, presents in this court the issue of allocation of functions between the trial court and counsel. This Court in *Shep-*

pard v. *Maxwell*, 384 U.S. 333, 358-62 (1965) properly allocated to the court the responsibility for protecting the jury against prejudicial publicity and ascertaining the existence and degree of prejudice. Finally, a decision on this issue is particularly appropriate to federal trials, in contrast to the procedure followed in some States, where the court conducts the *voir dire*.

The Existence of Apparently Conflicting Decisions of The Courts of Appeals

There exists an apparent if not real conflict in the Circuits as to the adoption and application of the *ABA Standards* relating to fair trial and free press which could and should be resolved by a granting of the writ in the instant case. The *ABA Standards*, particularly and most apropros to the instant facts the standards relating to *voir dire*, have been cited and approved by the Ninth Circuit in reversing in *Silverthorne* v. *United States*, 400 F. 2d 627, 639, fn. 15 (9th Cir. 1968). The Standards have also been cited with approval by the First Circuit in *Patriarca* v. *United States*, 402 F. 2d 314, 318 (1st Cir. 1968)

In sharp contrast are the actions of the Seventh Circuit below which refused to apply and did not refer to the *ABA Standards* argued to the lower court and here again presented to this Court. Similarily, in *United States* v. *Solomon*, 422 F. 2d 1110 (7th Cir. 1970), *cert. den.* —— U.S. —— (1970), the 7th Circuit, with Chief Judge Swygert dissenting, refused to apply the *ABA Standards*, ironically predicated in large degree upon the decisions of the 7th Circuit in *United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962), to the facts of that case.

For the reasons urged above, a re-examination of and an opinion by this Court as to the conduct of *voir dire* examination where there exists the potential for prejudice resulting from pretrial publicity is necessary and desirable.

5. The Judgment Of The Lower Court Should Be Vacated And The Case Remanded For A Determination Of The Existence And Legality Of Electronic Eavesdropping.

Petitioner respectfully submits that the lower court erred in failure to vacate the judgment of conviction and remand the case to the trial court for a determination of the existence and legality of electronic eavesdropping. In the trial court when petitioner moved for the production of any electronic eavesdropping of petitioner's conversations, the government responded by stating that there was no *illegal* eavesdropping, a response which the lower court properly characterized "not unequivocal" (App. B-24), but refused to reveal whether there was any other (presumably "legal") eavesdropping.* In the Court of Appeals the government produced a letter from the Department of Justice stating that petitioner was not " . . . the subject of *direct* microphone surveillance, nor were any of his conversations monitored." (emphasis added). (Brief for Appellee, p. 93). The Court of Appeals rejected petitioner's contention that this response was likewise equivocal and that the matter should be determined by the trial court.

Petitioner respectfully requests that this court consider and decide the issue posed by Mr. Justice Stewart

*A. 69-74; Tr. 931-941

in *Giordano* v. *United States*, 394 U.S. 310 (1969) — namely, whether petitioner should be accorded a hearing to determine the *existence* of eavesdropping. Such a hearing is, of course, consistent with the adversary process and, it is submitted, cannot be determined by an *ex parte* proceeding consisting solely of submission of a letter which petitioner cannot cross-examine. See *Kolod* v. *United States*, 390 U.S. 136, 137 (1968) Particularly in this so where, as here, the initial response of the prosecutor was highly equivocal, and he should be subject to cross-examination to determine if he had made the type of *ex parte* determination of legality or relevancy condemned by this Court in *Kolod* and *Giordano*.

For these reasons, it is respectfully requested that this Court grant the writ and consider and decide the issues herein presented or, alternatively, vacate the judgment of the lower court with instructions to remand the case to the trial court for the hearing requested. (Incident to this, it is likewise requested that this Court make further inquiry of the Department of Justice as to the existence of any eavesdropping).

CONCLUSION

For the reasons urged herein, it is respectfully requested that the judgment of the lower court be reversed, or in the alternative, that the same be vacated with directions to remand the case to the trial court for a hearing as requested in points 3 and 5.

Respectfully submitted,

RONALD P. ALWIN,
39 South La Salle Street
Chicago, Illinois 60603
(312) AN-3-6051

December 1970

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EARLE T. COOK,

Defendant.

JUDGMENT AND COMMITMENT

On this 6th day of February, 1968, came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of intending to disable and destroy an aircraft being used in interstate air commerce and damage to said aircraft, in violation of Section 32, Title 18, United States Code and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted,

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General of his authorized representative for imprisonment for a period of

TWENTY (20) YEARS on each of Counts 1 and 2, said sentences to run concurrently with each other.

IT IS ORDERED that the defendant's bond be and hereby is revoked and defendant remanded to the custody of the United States Marshal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ RICHARD B. AUSTIN,
United States District Judge.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 17128

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

EARLE T. COOK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

SEPTEMBER 25, 1970

Before SWYGERT, *Chief Judge*, CUMMINGS and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* The defendant, Cook, was charged in the United States District Court for the Northern District of Illinois in a two count indictment with violating 18 U.S.C. §32 by placing on November 12, 1967 a destructive device on a civil aircraft with intent to damage the aircraft (Count I) and by causing damage to a civil aircraft (Count II). Judgment of conviction on each count was entered upon a jury verdict of guilty on February 6, 1968, and Cook was sentenced to twenty years on each count, the sentences to run concurrently. This is an appeal from the judgment of conviction and sentence.

It was conceded, accepting the evidence in the light most favorable to the government, that the evidence was more than adequate to support the verdict and Cook did not urge on appeal that the conviction was against the weight of the evidence. He does, however, in his appeal urge seven technical grounds for reversal, being in regard to certain claimed improper governmental procedures prior to the trial and certain judicial errors both at the pretrial and trial levels.

The evidence, to which further particularized reference will be made in connection with specific points raised, tended to establish the following factual situation.

Beginning some four years prior to the incident directly involved, Cook, who had some history of marital discord, made approaches to individuals to attempt to make arrangements for his wife to be killed. On some of these occasions, there was discussion of the development of a device to set off explosives. On November 12, 1967, Cook drove his wife to the airport where she was taking a plane to California. He first checked two bags for his wife with a skycap, receiving two stubs therefor. Cook then returned to his car and took out a third bag and checked it through another skycap. He then gave the stubs for two of the bags to his wife but did not give her the stub to the third bag in which a bomb was secreted. There were some 81 persons on the 727 jet plane. Some place over Colorado a bomb exploded in the baggage compartment depressurizing the aircraft, which was nevertheless able to proceed on to San Diego without further mishap.

The FBI commenced immediate investigations which included interviews with the spouses, friends and relatives of all the passengers on the plane. Cook was inter-

viewed on November 14, 1967 and on November 17, 1967 he agreed to go to the FBI office in Chicago for an interview. While the interview was in progress, other FBI agents, acting upon a search warrant, removed a number of items from Cook's resident including a vise, pieces of wire and other electrical items. After the interview, which was terminated by Cook, he was driven back to his office at St. Charles, Illinois, where he was arrested and charged with the offenses involved herein. The FBI investigation indicated that the bag in which the bomb had exploded was the one involving the stub which Cook had not given to his wife. The total amount of the insurance payable if Mrs. Cook had been killed incident to a commercial air crash was $117,500.

DENIAL OF MOTION FOR DISCOVERY

The point on appeal most forcibly urged by Cook, and the one we deem most susceptible of requiring a reversal, arose out of the district court's ruling on a motion to produce.

On December 6, 1967, within the time extended by the court, Cook filed seven separate pretrial motions, none of which was accompanied by a brief or supporting authority in other form. The motion here involved is the motion for discovery which in its entirety reads as follows:

> "Now comes the defendant, EARLE T. COOK, by his attorney, JACK G. STEIN, and respectfully moves this Court to enter an Order permitting defense counsel to inspect and copy results or reports of scientific and laboratory tests made of any evidence to be presented by the Government in its case against the defendant. The defendant further moves that the Court allow the defendant and such necessary experts as may be necessary to examine said

> evidence at a place and time agreeable to this Court."

On December 14, 1967, the government filed its answers to defendant's motions, which *inter alia*, objected to the granting of the foregoing motion for discovery.

Cook filed no response as far as the record shows to the government's objections nor as far as we can determine took any other action to attempt to convince the court that the government's objections to the granting of the motion were invalid.

On December 19, 1967, the district court made the following order:

> "Defendant's motion that he and such experts as may be necessary is [sic] given leave to examine any physical evidence which the government intends to introduce in its case against the defendant prior [sic] to January 10th at a place mutually agreeable to the government and the defendant. The defendant's motion to permit counsel to inspect and copy results or reports of scientific and laboratory tests made of any evidence to be presented by the government in this case against the defendant is denied at this time without prejudice."

Because of the ultimate result we reach in this opinion, it is necessary to give some particularized attention to the government's answer objecting to the granting of the motion. The answer first pointed out that local Rule 13 of the district provided that any party filing should file citations of authority and that under the rule the court on its own motion might strike a motion not supported by a memorandum. The court here did not, at least in terms, purport to strike the motion because of noncompliance with the local rule. As the government's answer conceded, Cook was apparently relying on Rule 16(a)

of the Federal Rules of Criminal Procedure,' and it could not ordinarily be expected that a necessity existed for a district judge to have cited to him by way of memorandum the Federal rules. However, Rule 16(a) was substan-

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'The pertinent portion of Rule 16(a) reads as follows:
"(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant . . . (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. . . ."

Because of its material bearing on the matter under discussion, we also set forth pertinent portions of subsections (b) and (c) of Rule 16.

"(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. "c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable."

tially amended effective as of July 1, 1966 and at the time of the ruling on the discovery motion, approximately a year and a half later, there were judicial indications that both under Rule 16(a) and 16(b) a showing of materiality and reasonableness was necessary although this requirement was contained only in 16(b). These authorities were cited to the court by the government.

While subsequent interpretation of Rule 16(a) has now reached the place that it is generally conceded, upon application, the discovery provided for therein should be granted as a matter of right (1 Wright, Federal Practice and Procedure p. 501 (1969), nevertheless, it is equally clear that in 1967 this construction, although somewhat inevitable, had not been reached. Therefore, it would appear that Cook would have been well-advised to have complied with local Rule 13 and when objections were lodged by the government to the granting of the motion, it then being apparent that the motion might not be routinely granted, authority opposing the position of the government certainly should have been cited.

In its answer opposing the granting of the motion, the government next emphasized that the rule used the language, "the court *may* order" citing *Peck* v. *United States*, 321 F. 2d 934, 941-42 (9th Cir. 1963), cert. den. 376 U.S. 954 (1964), and *Ginsberg* v. *United States*, 257 F. 2d 950, 956 (5th Cir. 1958). Both cases involved the application of Rule 16 prior to 1966 and under the rule as it then existed both cases properly stated that the matter of allowance of discovery was discretionary with the judge.

No doubt, technically, it may be stated that the granting of relief to the movant under Rule 16(a) is still a matter within the discretion of the court, nevertheless it

also appears under the present interpretation of Rule 16(a) if the motion is in proper form and timely made, a denial of the motion would be an abuse of discretion. Indeed, this court has stated in *United States* v. *Isa*, 413 F. 2d 244, 248 (7th Cir. 1969), that a defendant has "the right to an order" permitting him to inspect under Rule 16(a) absent a showing by the government under 16(e) dealing with protective orders. This court in *Isa* (at p. 248) quoted with approval from *United States* v. *Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968), "it is wholly different, and wholly unsupportable, to say the Government may sit back, invoke the old generalities, and conceal from the defendant . . . unless the defendant shows some kind of 'particularized need' almost never identified by the prosecution because it is almost never possible to imagine, let alone reply."

It has also been stated by one respected authority that to obtain discovery under Rule 16(a) the defendant must show that the items sought are "relevant" in contrast to the showing of materiality and reasonableness necessary under 16(b). 8 Moore, Federal Practice §16.03[1], pp. 16-17 (2d ed. 1969).

While it is true in construction of statutes, and presumably also in the construction of federal rules, that the word "may" as opposed to "shall" is indicative of discretion or a choice between two or more alternatives, the context in which the word appears must be the controlling factor. A good statement on the subject is contained in *Thompson* v. *Clifford*, 408 F. 2d 154 (D.C. Cir. 1968), where the court stated (p. 158):

> "'May' ordinarily connotes discretion, but neither in lay nor legal understanding is the result inexorable. Rather, the conclusions to be reached 'depends on the

> context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty.'" (footnotes omitted)

On the other hand, we are not unmindful of equally well established rules of construction that effect must be given, if possible, to every word, clause and sentence of a statute. *United States* v. *Montgomery Ward & Co.*, 150 F. 2d 369, 379 (7th Cir.), remanded and vacated as a moot cause, 326 U.S. 690 (1945), citing Kent's Commentaries (13th Edition 1884) 462. *See also Central National Bank* v. *Continental Casualty Co.*, 182 F. 2d 407, 409 (7th Cir. 1950).

A further suggestion of latitude to the district judge in the application of Rule 16(a)(2) (the portion if the rule here involved) is found in the language of subdivision (e), "[i]f the court grants relief sought by the defendant under subdivision (a)(2). . . ." Therefore, while we are of the opinion that the district judge in the case of a motion under Rule 16(a) which is in proper form and timely made, has little, if any, discretion as to denying the motion in the absence of particularized reasons advanced under 16(e), nevertheless, and in part because of the use of the discretionary words bringing into play a conflict between well-established rules of construction, we are also of the opinion that at the very least the district judge, as a part of his general latitude in controlling proceedings before him, has the power to control the chronology of discovery procedures. As long as basic or vested rights are not violated it would seem that the judge should have the same right of latitude in supervision over pretrial procedures as he does of the conduct of the trial itself. *See Walsh* v. *United States*, 371 F. 2d 436, 438 (1st Cir. 1967).

In this view of this matter, the district court's form of order becomes particularly significant. Cook was granted leave to examine all of the physical evidence intended to be introduced in the case against him, which leave included "such experts as may be necessary." It was against this background of inspection of the physical property, which would have been the basis of the reports of scientific and laboratory tests made of this evidence, that the judge denied the motion to inspect the reports "at this time without prejudice."

It seems clear to us that the district judge, even though with some residuum of anti-fishing expedition feeling, was stating to the defendant that "as a first step of your discovery you should look at the physical evidence with your experts and then, since I am not entering a final denial but merely one without prejudice at this time, you may then come back if it is indicated as being necessary and ask for the inspection of the reports." As a matter of fact, the government as a final part of its answer to this particular motion, while urging that the motion for inspection and copying of the reports be denied, requested that all objects be permitted to be inspected, stating: "The inspection will therefore include all objects subject to such experimentation which the Government obtained from all searches and which were secured from the remains of the explosive device on the American Airlines aircraft referred to in the indictment."

The government in its answer did move, in the event the court should grant the inspection, that under Rule 16(c) it have inspection and copying of any scientific reports of the defendant.

As indicated hereinbefore, insofar as the record shows, no further effort of any kind was made to demonstrate

to the court the incorrectness of the government's position nor to follow up the implicit invitation in the judge's denying the motion" without prejudice."

From our present point of view, realizing that no other result could have been reached in *United States* v. *Isa*, 413 F. 2d 244 (7th Cir. 1969), we may wonder why the government took the position it did in opposing Cook's motion for inspection. It would appear from the record that the FBI scientific tests were simply that, and did not involve expert judgments as such, but rather opinions based upon clearly demonstrable physical objective facts. If the experiments had called for an exercise of judgment, no doubt the government as an adversary would have been desirous of keeping the judgment opinions and the facts on which they were based from the defendant and his experts as long as possible. This factor, however, seems non-existent in the case before us.

Further, in the decision handed down just thirteen days before the government filed an answer to the motion, another district judge in the same district from which this appeal arises strongly criticized the government in a comparable situation for opposing discovery in proper cases.[2] Nevertheless, the government chose to ignore the

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2"We think the Government should be prepared to fulfill its duties and should tender proper information upon request in motions like the instant one. . . . Blanket refusals to supply particulars or discovery without legal justification, and compelling trial courts to sift through a series of requests such as we have done in the case at bar, is a pure waste of judicial manpower and hours, and is not in the best interests of proper judicial administration. We invite the Government to reevaluate its thinking in this area, . . ." *United States* v. *Tanner*, 279 F. Supp. 457, 478 (N.D. Ill. 1967).

admonition of the other district judge and did oppose the granting of the motion and therefore it is necessary on this posture of the facts to determine whether in so doing it participated in the production of reversible error.

In at least one circuit, a decision involving the present Rule 16 found the application for relief under the discovery rule to be a matter within the sound discretion of the court and reviewable only for an abuse of discretion. *Hemphill* v. *United States*, 392 F. 2d 45 (8th Cir. 1968). This appears to be an exception to the presently accepted view. The court found no abuse of discretion particularly in the absence of any showing that the defendant was prejudiced. Involved was discrepancy in the scientific analysis of the contents of a package which the court held did not amount to a fatal variance between the indictment and proof. The court also pointed out that the variation was seized upon in cross-examination and closing argument. In the case before us, cross-examination was directed to eliciting admissions from the scientific test witnesses that the tools and bomb fragments were mass produced, could be obtained anywhere and that crimp marks could have been made by a variety of tools, any of which were commercially available in large numbers. Cross-examination further elicited that the pieces of wire were not necessarily from a continuous coil of wire. Also in final argument the position was taken by defense counsel that the scientific evidence against Cook was only circumstantial and equivocal. Nevertheless, Cook strenuously contends that he was prejudiced by not having the opportunity on a pretrial basis to know what the scientific experts would testify. We must accept this position and if in the overall picture a motion was improperly denied we must reverse.

To determine whether there is what may be called a totality syndrome adequate to vitiate any error in the fact that copies of the scientific test reports were not made available to Cook in advance of trial it is necessary that we examine other significant elements bearing on the present issue.

In accordance with the court's order, Cook and his attorney did appear at the FBI offices and did view the physical evidence the government planned to introduce at trial. Cook brought no experts with him at this time nor did he ever subsequently request that one be allowed to examine the evidence. Cook now complains that he could not "know what kind of experts to bring with him" and asserts that when in his motion he asked that he "and such necessary experts as may be necessary" be permitted to examine said evidence he was predicating this on a favorable ruling on the motion for inspection of the reports. Having learned of the court's order that he was not at this time to have the reports, he apparently did nothing in the way of attempting to secure an expert in the explosive field or in mechanical engineering to take with him to view the evidence. We cannot conceive that competent counsel[3] could not have obtained and taken with him a scientific expert in the general fields involved who, if not in a position to have commented directly on the evidentiary potential of the physical evidence, would have been able to have directed counsel to experts in the appropriate fields. Indeed, if Cook's counsel did feel helpless in determining what type of expert or experts to take with him to the FBI offices the situation implicitly called for his then going back to the court, reminding the court that the denial of the reports had been "without prejudice" and that it was re-

cessary that the reports be examined so that the proper expert or experts could be selected by the defendant. Cook did not do so nor at any time subsequent to the visit to the FBI office was there any effort made to move the court from its previous non-prejudicial denial of the motion.

While the phrase "without prejudice" seems to have no discoverable case history, at least as far as we have been able to determine, in connection with rulings on motions under Rule 16, nevertheless, the phrase is certainly not a stranger to the law. It most frequently is tied to a case dismissal and it is well established that it carries no res judicata effect and forecloses no issues. It has been stated that the words "without prejudice" show an intention further to litigate issues. *Brunswick Corporation v. Chrysler Corporation*, 287 F. Supp. 776, 778 (E.D. Wis. 1968).

Cook through his counsel obviously appears consciously to have chosen not to litigate this particular issue further and indeed to make nothing further of the application. This remained true from the time the court denied "without prejudice" until this appeal. Cook filed a motion for a new trial in the court below and although numerous grounds, thirteen in all, for a new trial were specified therein, the motion was silent as to this particular ground.

If it were standing alone we would find no significance in failing to specify the denial of the discovery motion as a ground for a new trial. Under federal procedure,

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[1]Counsel who tried the case were not involved in this appeal. There seems to be no suggestion, direct or implied, that the trial counsel were less than fully competent.

it is not necessary to file a motion for a new trial in order to have reviewed on appeal questions properly preserved at trial. Federal Rules of Appellate Procedure, Rule 4; *United States* v. *Mountain State Fabricating Company*, 282 F. 2d 263, 265 (4th Cir. 1960).*

However, examining the matter in the totality syndrome context, we find some significance in the failure to specify the claim of denial of discovery as being consistent with what apparently was a conscious determination not to raise further at the trial level the issue involved. To have done so would have permitted the trial judge, who heard all of the evidence and who would have been in the best position to have judged the prejudicial effect of the lack of discovery, to have passed on this particular issue. He did not have the matter again brought to his attention nor was it brought to his attention otherwise, including objections to the admissibility of the testimony, including objections to the admissibility of the testimony or by a motion for a continuance for the purpose of securing experts who could testify to the contrary.

Cook relies heavily on *United States* v. *Kelly*, 420 F. 2d 26 (2d Cir. 1969), in which the court on the facts before it spoke of the course of the government as smacking too much of trial by ambush in violation of the spirit of the discovery rules. We do not find, however, that the facts in *Kelly* make it applicable here. There is similarity in that the government opposed the broad request of the defendant as being a fishing expedition and the trial

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*"A motion for new trial is not essential in this jurisdiction to entitle a party to a review by the Court of Appeals. This has been so repeatedly decided as not to require the citation of authorities." *Aaron* v. *United States*, 155 F. 833, 838 (8th Cir. 1907).

judge, apparently without criticism from the Court of Appeals, denied the broad discovery sought but did permit inspection of the chemical analysis of certain involved drugs. This information was furnished, but thereafter the government conducted a new type of drug test as to which they did not advise the defendant as required by Rule 16(g). The defendant did not become aware of the new test until after the testimony of the prosecution's first witness. It is significant that the defense made a motion for a continuance to carry out its own version of the test in question, which motion was denied. In *Kelly*, steps were taken not only to preserve a record but also to give the trial court an opportunity to remedy the situation at the trial level. This was, as far as we can ascertain, consciously a matter refrained from by Cook.

Where parties, even in a criminal case, knowingly and deliberately turn down a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time after a decision has been rendered adverse to them, to obtain a retrial according to the procedure which they had voluntarily discarded and waived. *Carruthers v. Reed*, 102 F. 2d 933, 938 (8th Cir.), cert. den. 307 U.S. 643 (1939).

The combined impact of the various elements comprising what we have termed the totality 'syndrome' we find adequate to eliminate any claim of error on the district court's ruling on the motion for discovery.

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[1] The significant elements are failure to cite supporting authority under local Rule 13; no response to government's objections; failure to point out incorrect statements of law therein; a partial granting of the motion with the remainder of the motion being only denied "at this time without prejudice"; an actual examination of

While it has been stated that the reason for broader discovery in criminal cases is not the same as in civil cases, i.e., the search for truth, see 8 Moore Federal Practice §16.02[1], p. 16-11 (2d ed. 1969), nevertheless the result of the substantial broadening of Rule 16 has placed in the hands of the criminal defendant materials from prosecutors' files which were not previously available to him. We do not believe that this protective device should be subverted in its use so as to become a gaming device with which to gain an undeserved acquittal. We do not deem that the liberalized rule requires the forcing of discovery upon a defendant and if he consciously and deliberately chooses not to utilize the remedy after only a casual effort he can not complain that he was prejudiced on appeal.

While we find no reversible error in the court's ruling on the motion for discovery, we do so on the narrow issue of the facts before us.

We find the remaining grounds for reversal urged by Cook less troublesome but shall consider each of them as raised.

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all of the physical evidence with the right to have experts present; failure at any time during the trial or post-trial procedure before appeal to raise the question; failure to move the court for examination of the reports notwithstanding denial of the motion without prejudice; the fact that persistence in an effort to get the reports would have brought into play Rule 16(c) with regard to any defense experts; failure to object to the testimony on the ground involved in the trial; failure to move for a continuance following the realization of the import of the evidence; approach during cross-examination and final argument that the expert testimony did not prove anything which would have been somewhat inconsistent with putting on one's own experts; and failure to include the issue in the motion for a new trial.

CLAIM OF FIFTH AMENDMENT PRIVILEGE

Cook contends that testimony of a FBI agent to the effect that Cook had terminated an FBI office interview and refused to submit to further questioning, thereby "exercising his Fifth Amendment privilege . . . in the face of accusation," requires reversal, citing *Miranda v. Arizona*, 384 U.S. 436, 468, n. 37 (1966); *United States v. Kvel*, 374 F. 2d 772 (7th Cir. 1967); *United States v. Nielsen*, 392 F. 2d 849 (7th Cir. 1968); *United States v. Kvoulach*, —— F. 2d —— (7th Cir. 1970).

We do not disagree with the principle urged by Cook that it is impermissible to penalize an individual for exercising his Fifth Amendment privilege while he is under custodial interrogation. However, we do not find this principle applicable to the situation now before us. Cook contends the challenged testimony was given over defense objection, which assertion is controverted by the government, and examining the record we find the government's position is correct. Special Agent Parrish of the Federal Bureau of Investigation had testified at length in narrative form regarding conversation between Cook and himself in the FBI office in Chicago on November 17, 1967. When the agent had reached in his testimony the point of coverage toward the end of the interview in the FBI office, he testified as follows: "I said, 'Mr. Cook, when you came into our office you were extremely confident and sure of yourself.' I said, 'Now you appear to be perspiring and worried.'" The agent then started into a further narrative beginning, "[a]nd he said—." Counsel for Cook who had not been objecting to the general narrative then stated "I will object to that, Your Honor." The court overruled the objection and there was no further

discussion of the matter nor did Cook's counsel specify any grounds whatsoever for the objection.

The agent then proceeded to report Cook's reply to which the agent asked him why he did not tell the truth about his participation in the matter. The agent then reported Cook's reply to that matter after which the agent gave the challenged testimony, without objection, as follows:

> "At this point Mr. Cook said that he wished to terminate the interview providing that the FBI would keep their promise that Mr. Baker would return him to St. Charles, so on the basis of this the interview was terminated and Mr. Cook left my office."

There was no motion to strike the testimony from the record nor to admonish the jury to disregard the matter. The challenged testimony, at least challenged on this appeal, was not referred to in the motion for a new trial, although for the reasons we have hereinbefore advanced in this opinion, we do not give persuasive significance to the omission of this particular item from the motion for a new trial.

We do find, however, that there were no objections to the testimony, either by way of advance objection or by motion to strike it from the record. The only objection made was several paragraphs in advance of the challenged testimony and that objection failed to specify any grounds for sustaining the objection.

The same agent had testified at a pretrial hearing as to the identical facts with regard to the termination of the interview so that counsel for Cook certainly could claim no surprise or lack of knowledge that Cook had elected to terminate the interview. Ordinarily, the admissibility of evidence cannot be questioned in this court on

grounds not presented to the trial court and failure to object ordinarily precludes error. *United States* v. *Lyon*, 397 F. 2d 505, 508-09 (7th Cir. 1968), cert. den. sub. nom., *Lyon*[illegible] v. *United States*, 393 U.S. 846 (1968). It is a good rule of practice to alert clearly and distinctly the trial judge, and opposing counsel, to every claim intended to be preserved for possible appeal. *See United States* v. *Hall*, 348 F. 2d 837, 843 (2d Cir.), cert. den., 382 U.S. 947 (1965). Ordinarily, where evidence is admitted over objections but no grounds are stated for the objections, they will not be considered on appeal. *Stewart* v. *United States*, 131 F. 2d 624 (9th Cir. 1942).

While we feel that the lack of objection to the testimony in question is dispositive as to the point involved, nevertheless, we are not unmindful of situations wherein serious and harmful error of constitutional proportions involving the admission of harmful evidence may nevertheless be subject to review notwithstanding the lack of proper objections. *See Harrison* v. *United States*, 387 F. 2d 203, 214 (D.C. Cir. 1967); *United States* v. *Rizzo*, 418 F. 2d 71, 78 (7th Cir. 1969). We therefore have re-examined the testimony in question in the context in which it was given and from such an examination we are of the opinion that under no reasonable interpretation could this testimony be considered as being in derogation of Cook's right to be free of any suggestion to the jury that he had exercised his privilege under the Fifth Amendment.

Cook had been at the FBI office voluntarily under interview since approximately 10:30 in the morning and the interview was terminated by him at about 3:40 p.m. There is no suggestion in the testimony that Cook was exercising a constitutional privilege against self-incrimination.

The challenged testimony immediately followed a question of Cook: "So far you have not told me enough to convince me, a jury or anybody else that I should submit anything." The challenged testimony is too slender a reed to be the basis of inference of self-incrimination. The challenged testimony was the natural culmination of the testimony in narrative form as given by the agent regarding the interview.

We find no merit in this casual factual statement during the agent's recitation of the occurrences of the interview, being sequentially a part of the chronology of the actual interview. Our position is buttressed by the fact that no reference was made to the termination of the interview either during the trial or during closing argument.

SEARCH AND SEIZURE

A search of the Cook residence was conducted by FBI agents while Cook was being interviewed at the FBI office and a number of items were taken and were transported to the FBI laboratories for scientific tests.

Among other pretrial motions, Cook filed a motion to suppress, alleging, *inter alia*, that no probable cause was shown in the affidavit for the issuance of the warrant. This matter was not pursued in this appeal. The motion to suppress continued to the effect that if the motion to suppress were denied on the grounds alleged, the court should suppress certain items which were not named in the particular search warrants. While some of these items, nineteen in all, were of the type specifically named in the warrant, such as tape and wires, being materials which were susceptible to being the component parts of an explosive device, most of the items challenged in the

motion were what might be categorized as workshop tools. On this appeal, Cook has narrowed the objection down to one workshop item, being his vise. The motion to suppress was overruled and the vise was admitted in evidence over general objection. The evidentiary use of the vise was undoubtedly detrimental to Cook's defense as Special Agent Killion testified from his examination that the bolt on the alarm clock found in the post-explosive debris in the airplane contained tool marks which were produced by the vise taken from the Cook residence.

Many of the cases in the search and seizure area are not direct authority on the matter before us, involving as they do search and seizure without a search warrant as an incident to a lawful arrest which "has always been considered to be a strictly limited right." *Trupiano v. United States*, 334 U.S. 699, 708 (1948).

Even where the search warrant is secured, this is not deemed to be a license for unlimited search and seizure, but specificity must be involved. This particularization must be very narrowly limited in some fields, e.g., identification of stolen property.

The situation before us, however, is one which we find to be covered by a holding of the Tenth Circuit which stated, in language we approve, the following:

> "Search warrants are required to particularly describe the things to be seized and officers executing the warrant are authorized to seize only the property described. 'A general search is not permitted. . . . [citing authorities] This rule is not applicable to facts of this case. . . . All of the articles have a reasonable relation to the purpose of the search and could be seized under the authority of the warrant." *Messmer v. United States*, 405 F. 2d 316, 319 (1969).

In determining whether the vise bore a reasonable relation to the purpose of the search and whether it could be seized under the authority of the warrant, we turn first to the affidavit before the United States Commissioner. This is a typewritten, single-spaced, six-page document giving in great particularity factual information and the source thereof concerning efforts, prior to the instant situation, on the part of Cook to kill his wife and showing that an explosive device, of what might be termed home-made character, had been placed aboard the airplane in question and had exploded. The affidavit described various component parts of such a bomb obviously based upon the residue found in the airplane after the explosion. Equally obviously, the agent could not have known what particular tools might have been used in assembling the component parts of the explosive device and the affidavit therefore, after detailing the component parts, specified: "[A]nd other instrumentalities, all of which were designed and intended for use . . ." as a means of committing offenses under the United States Code, including 18 U.S.C. §§31 and 32, pertaining to destructive substances on aircraft. There could have been no reasonable doubt in the Commissioner's mind that the purpose of the affidavit was to secure a search warrant for the residence of Cook for component parts of explosive devices and the instrumentalities used in preparing such devices.

The search warrant which was issued included "other instrumentalities." We find Cook's contentions in this regard without merit.

NEWSPAPER PUBLICITY AND THE JURY

Prior to the impaneling of the jury and during the course of the trial itself, the Chicago newspapers carried major articles concerning the factual situation involved.

Cook first contends that the conviction should be reversed in the exercise of this court's supervisory power because on the arrest of Cook the FBI improperly released to the press the major part of the evidence presented at the trial resulting in massive news coverage. The record fails to support this assertion. The information involved was in the affidavit for the search warrant which was a public record.

Cook next contends that inasmuch as several of the prospective jurors had heard about the case, presumably through the news media, the court should have individually questioned them out of the presence of the others to determine whether the probability or possibility of prejudice existed. The same contention was raised with regard to the detailed coverage of the trial in the newspapers to the effect that the individual jurors should have been questioned about the possible effect upon them of the trial coverage. Also, Cook contends that *voir dire* failed to go sufficiently in depth.

While the government on this appeal points out the very substantial extent to which the trial judge directed his attention to insuring that the jury was not prejudiced by any extraneous elements such as news items, that Cook's counsel were accorded full opportunities to question the jurors with respect to this matter and that available peremptory challenges were not exercised as to the jurors who had knowledge of the case, we do not need to decide the point upon any of these elements other than the contention that the court's inquiries as to prejudice were inadequate. We find this contention not to be supported by the record.

With regard to the individual interrogation, while we could rest our decision on *Margoles* v. *United States*, 407

F. 2d 727 (7th Cir.), *cert. den.*, 396 U.S. 833 (1969), we only need to observe that no objection was made to the judge's joint interrogation of the jurors and this issue was first raised on appeal. *United States* v. *Fannon*, 403 F. 2d 391 (7th Cir. 1968), vacated on other grounds, 394 U.S. 457 (1969), is dispositive of the issues here raised.

Margoles, of course, emphasizes that the existence of prejudicial publicity before the trial presents different legal issues than does such publicity during the trial. In the case before us, however, the court adequately handled the situation in advance of trial collectively, and during the course of the case the court inquired daily of the jury to ascertain whether they had complied with his instructions not to read or listen to anything about the case. There is no indication whatsoever that they had failed to follow his instructions and, therefore, there was no admitted contact with prejudicial publicity requiring separate and private interrogation. *See United States* v. *Solomon*, 422 F. 2d 1110 (7th Cir. 1970).

MIRANDA RIGHTS

Cook next contends that the interview at the FBI office on November 17, 1968 constituted a violation of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The contentions in this regard are two-faceted, being that he did not waive his *Miranda* rights and that the *Miranda* warnings given by the FBI were constitutionally insufficient.

There is substantial basis for argument that the doctrines of the *Miranda* case were not applicable here in that Cook was not in actual custody at the time of the interview, that he did not think he was in custody at that time, was not told that he was under arrest, and was free to terminate the interview at any time, which in fact he did do. *United States* v. *Manglona*, 414 F. 2d 642 (9th

Cir. 1969); *Posey* v. *United States*, 416 F. 2d 545 (5th Cir. 1969).

Assuming *arguendo* that there were aspects of in-custody interrogation, we nevertheless find no merit in Cook's contentions on this point.

Special Agent Baker went to Cook's office and asked him if he would accompany the agent to Chicago for an interview. The agent told Cook that he was free not to come, that if he did come to Chicago to speak with agents of the FBI he was free to terminate the interview at any time. The agent further told Cook that he had a right to remain silent, that anything he did say could be used against him subsequently, that he had the right not to be interviewed, that he had a right not to go anywhere with him or any other representative of the FBI, and that he had the right to have the services of an attorney because he had a right to have an attorney at that point or at any stage.

Cook replied that he was happy to go, that he wanted to be cooperative, and he saw no reason to have a lawyer.

Arriving at the FBI office he was asked by other agents if he had been advised of his constitutional rights and answered in the affirmative that he had. He nevertheless was given a second warning, including the fact that he was entitled to legal counsel. Following this he executed a voluntary appearance form which by his own admission he read and understood. Following this he was given and signed the standard FBI waiver of rights form which contained the *Miranda* warning. He again disavowed any need for counsel since "he had nothing to hide."

Taking language from *Miranda*, Cook contends that he should have been warned that anything he said "can and will be used against" him (384 U.S. at 469). We do

not think that *Miranda* requires a definite assertion that the statement *will* be used. This court has held that there is no reversible error in the use of the word "might" rather than "will" in the warning. *United States* v. *Johnson*, —— F. 2d —— (7th Cir. May 6, 1970).

We hold that the *Miranda* warnings given to Cook, although arguably not necessary in the particular circumstances, were constitutionally adequate and that Cook knowingly waived his rights flowing from *Miranda*.

PROSECUTOR'S ARGUMENT

Cook contends that his constitutional rights to a fair trial were violated by the prosecutor's characterization of Cook during final argument as a "sub-human man" with a "rancid, rotten mind," a "true monster." Cook also contends that the prosecutor implied to the jury that they were, in effect, doing Cook a favor by listening to him and according him his constitutional right to a trial.

We do not find any reversible error here. The district attorney is quite as free to comment legitimately and speak fully, although harshly, upon the action and conduct of the accused, if the evidence supports his comments, as is the accused's counsel to comment upon the nature of the evidence and the character of the witnesses which the government produces and which is favorable to him. *United States* v. *Freeman*, 167 F. 2d 786, 791 (7th Cir.), *cert. den.* 335 U.S. 817 (1948). Even though the prosecuting attorney's remarks out of context might seem on the intemperate side, we are not dealing here with an income tax evasion case, *United States* v. *Fidanzi*, 411 F. 2d 1361 (7th Cir.), *cert. den.*, 396 U.S. 929 (1969), nor a mail fraud case, *United States* v. *Hoffman*, 415 F. 2d 14 (7th Cir.), *cert. den.*, 396 U.S. 958 (1969). Instead there was substantial evidence that Cook had en-

gaged in a plot to kill his wife by having a bomb explode on an airplane and if the explosion had been more violent not only Cook's wife but some eighty other people would have plunged to certain death. We cannot assume that Cook merely intended a mild bomb explosion which would depressurize the plane only. There would seem to be evidence supporting the comments of the prosecuting attorney.

Further, objections were not lodged to all of the remarks challenged on this appeal. In some instances, if a prosecuting attorney's remarks were continuously of an inflammatory nature with an appeal to prejudice or similar improper motives, the court might well have the duty *sua sponte* to correct the situation. Here, however, it is to be noted that when the words are placed in their context the closing arguments of the prosecution staff did not constitute an inflammatory type of appeal. The government's closing argument and rebuttal span sixty-five pages of the transcript and took an hour and a half to deliver. Yet only a few epithets uttered in the midst of an otherwise perfectly proper argument were involved. Substantially all of the argument, as it should have been, was an analysis of the evidence and the prosecutor's remarks were not "pronounced and persistent" as contended by Cook.

The comment contained in *United States* v. *Ramos*, 268 F. 2d 878, 880 (2d Cir. 1959), is applicable here:

> "[T]he comments complained of comprised only six lines (in the typed transcript) interspersed throughout a 24 page summation on the rest of which was devoted to a thorough review of the facts and fair argument thereon. . . . The overwhelming predominance in the prosecutor's summation was stress on the details of the evidence and the reasoned infer-

> ences to be drawn therefrom. And it is not wholly without significance that of the comments now complained of several passed without objection at the time. . . . Appraised against the background of the trial, the whole summation and the judge's charge, the fleeting passages complained of, we feel sure, were not intended, or effective, as appeals to passion or prejudice and did not vitiate the fairness of the trial."

As in the *Ramos* case, the government attorney in the case before us told the jury at the beginning and end of his closing argument that his remarks were not evidence, which warning was repeated by counsel for Cook. In his charge to the jury, the judge also instructed the jurors that arguments of counsel were not evidence, and that they were to rely solely on the evidence presented without prejudice.

Finally, it is to be noted that not only did Cook's counsel state to the jury that the prosecutors had ably represented the government and that he had never seen a better job, but in closing arguments for Cook similar phraseology to that complained of on the part of the prosecutor was used; for example, the statement was made, that "only an ogre, a monster . . . would put a bomb on a plane . . ." and that the defendant was being charged with "the most brutal, vicious crime any of us have ever come across."

Because of Cook's contention that one of the prosecutor's remarks was a clear implication that "a man like that" does not deserve a trial and most certainly would not receive one in another judicial system, we must look at the entire remarks questioned.

Following some minutes of analysis of the evidence, the following occurred:

"You have heard the sordid evidence in this case. You have heard how that man, that man tried to blow up 80 people. You have heard it right here. It is fantastic. It is utterly fantastic, but he did it just that way. And you sat here dignifiedly and you listened intently. He deserves it. Our judicial system permits this kind of a trial even for a man like that.

Mr. Brown: I will object to that, your Honor.

The Court: The objection is overruled.

Mr. Schultz: Even for a man like that, because in our country we give everybody what they are entitled to under our judicial system. We sit here quietly and calmly and carefully and we listen to the evidence. And the Government has to prove its case beyond a reasonable doubt and we have done that. You have listened to the evidence, and on the evidence alone that I have just presented to you, we have proven that that man is guilty beyond all reasonable doubt."

The Assistant United States Attorney then proceeded to discuss in further detail the evidence.

We do not find the implication for which Cook contends. He relies on *United States* v. *Hughes*, 389 F. 2d 535 (2d Cir. 1968). There the court reversed because of the prosecution's explicit statement that the defendant is "doubly vicious because he demanded his full constitutional rights here knowing full well he was guilty." Also, it is to be noted in *Hughes* that the court was quite reluctant to reverse because of the obvious guilt, but the intemperate statement coupled with an erroneous instruction, in the court's opinion, necessitated reversal.

In the case before us, while the prosecution, in view of the clear evidence, may have been unnecessarily skating on thin ice, we do not find that a fracture thereof occurred necessitating reversal.

The case is more nearly analogous to that of *McManaman* v. *United States*, 327 F. 2d 21 (10th Cir. 1964), where the court stated the following (at page 24):

> "The remarks of government counsel in closing argument which are said to be prejudicial were: ' . . . We are not dealing with any amateurs.' 'Even to a fair trial. . . .' 'I opened my closing statement by saying we are not dealing with ordinary violators.' These remarks were not of a character as to deprive the defendants of a fair trial and were not unwarranted by the record. The dominating question, always, is whether the argument complained of was so offensive as to deprive the defendant of a fair trial.'"

It is true in *McManaman* that no objection was made. However, this does not preclude consideration of error prejudicial to the fundamental rights of the accused.

Here in the context in which the remarks and questions were made, we do not find implicit therein any comment which reasonably could have been interpreted as that the accused should not have exercised his right to a trial.

ELECTRONIC EAVESDROPPING

Cook's final contention is that the trial court erred in refusing to require the government either to disclose to the defendant, or in the alternative to the court *in camera*, the existence of any electronic eavesdropping of defendant or his premises with sufficient facts and circumstances to enable the court to determine whether the eavesdropping, if any, was legal or illegal. Cook replied in this respect on *Giordano* v. *United States*, 394 U.S. 310 (1969); *Taglianetti* v. *United States*, 394 U.S. 316 (1969); and *Alderman* v. *United States*, 394 U.S. 165 (1969). The only indication brought to our attention,

which we have found in the record to support the thought that there were any electronic eavesdropping devices, arises out of the assertion when the matter came before the district judge that on cross-examination there was some question about a telephone conversation that the defendant had had. The government attorneys were not unequivocal about whether any electronic listening devices had been employed but merely asserted that there were "no illegal eavesdropping devices used." The government counsel declined to state to defense counsel and the court whether or not eavesdropping equipment had been used.

In *Giordano*, Mr. Justice Stewart in concurring states that the procedures the district courts are to follow in making a preliminary determination that a surveillance has violated the Fourth Amendment have not been specified. He further stated, at page 314, that nowhere has it been indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings. In other words, full disclosures are not required to the adversary unless and until the district judge determines that an illegal electronic surveillance device was used. The judge here was not given the opportunity of making that determination. However, in its brief on this appeal, the government flatly asserts that "there was no electronic surveillance involved in this case. . . ." This was supported by a letter from the Chief of the General Crime Section, Criminal Division of the Department of Justice. It would have seemed preferable either that this information would have been available at the trial at the time the matter arose or at least that the information would have been furnished to the district judge.

Cook argues that the letter itself from the Criminal Division of the Department of Justice is not entirely unequivocal on the subject, but we do not agree.

For the reasons hereinbefore set out, the judgment below is affirmed.

AFFIRMED

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Friday, September 25, 1970

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **No. 17128 vs. EARLE T. COOK,** *Defendant-Appellant.*	**Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.**

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Wednesday, November 25, 1970

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **No. 17128** **vs.** **EARLE T. COOK,** *Defendant-Appellant.*	**Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.**

On consideration of the petition of defendant-appellant Earle T. Cooke for a rehearing by the Court *en banc* in the above entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the petition for an *en banc* rehearing, and the panel having voted to deny a rehearing;

IT IS ORDERED that the petition of appellant for a rehearing *en banc* be, and the same is hereby, denied.

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CITATIONS

Cases:

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James v. *United States*, 416 F. 2d 467, certiorari denied, 397 U.S. 907 — 4

Lazarus v. *United States*, No. 395, O.T., 1970, certiorari denied October 19, 1970 — 10

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Statutes and rules:

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. (Supp. V) §§ 2510–2520 — 8

Organized Crime Control Act of 1970, 84 Stat. 922 *et seq.*

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417-300—71——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1166

EARLE T. COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1–B32) is reported at 432 F. 2d 1093.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1970 (Pet. App. A). A petition for rehearing was denied on November 25, 1970. The petition for a writ of certiorari was filed on December 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a vise was properly seized under a search warrant authorizing seizure of instrumentalities used in preparing an explosive device.

2. Whether, in ruling on a pretrial motion to inspect, the trial court may defer inspection of reports of F.B.I. scientific tests of the remains of an explosive device until after the defense has inspected the physical evidence upon which the tests were made.

3. Whether petitioner was denied effective assistance of counsel.

4. Whether there was a proper voir dire examination of prospective jurors.

5. Whether the court of appeals properly refused to remand the case for a hearing to determine if the case was tainted by electronic surveillance.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted under a two count indictment charging him with placing a destructive device on, and causing damage to, an airplane, in violation of 18 U.S.C. 32. He was sentenced to twenty years on each count, the sentences to run concurrently. The court of appeals affirmed.

The sufficiency of the evidence, which is not disputed, was summarized by the court below in part as follows (Pet. App. B2):

> Beginning some four years prior to the incident directly involved, Cook, who had some history of marital discord, made approaches to

individuals to attempt to make arrangements for his wife to be killed. On some of these occasions, there was discussion of the development of a device to set off explosives. On November 12, 1967, Cook drove his wife to the airport where she was taking a plane to California. He first checked two bags for his wife with a skycap, receiving two stubs therefor. Cook then returned to his car and took out a third bag and checked it through another skycap. He then gave the stubs for two of the bags to his wife but did not give her the stub to the third bag in which a bomb was secreted. There were some 81 persons on the 727 jet plane. Some place over Colorado a bomb exploded in the baggage compartment depressurizing the aircraft, which was nevertheless able to proceed to San Diego without further mishap.

ARGUMENT

1. Several days after the explosion, the F.B.I. obtained a warrant to search petitioner's home. The six-page affidavit,[1] filed in support of the application for the warrant, recited facts about the airplane explosion and petitioner's prior efforts to kill his wife, including his statement that he "knew how to rig a time bomb with a clock and dynamite and had experience with such an explosive device." The warrant authorized seizure of items similar to the components of the bomb found on the plane and of "other instrumentalities which are designed and intended for use and which have been used as a means of committing

[1] The affidavit is on file with the Clerk.

offenses" in violation of the statutes pertaining to placing destructive devices on airplanes. The initial contention here is that a vise, whose markings were present on the bell of an alarm clock found in the post-explosion debris, was improperly seized under the warrant.

The object of the warrant, as the court below noted, was to seize the "component parts of explosive devices and the instrumentalities used in preparing such devices" (Pet. App. B22). The items which could be described—those similar to the components of the bomb found in the plane—were specified in the warrant. The agents could not know with certainty, however, the particular tools used in making the bomb. The phrase, "instrumentalities used in preparing" explosive devices, was sufficient to identify them for purposes of the warrant. See *James* v. *United States*, 416 F. 2d 467, 473 (C.A. 5), certiorari denied, 397 U.S. 907. Cf. *Steele* v. *United States*, 267 U.S. 498, 503.[1] It is clear that a vise could reasonably be considered to be among such instrumentalities.

2. Prior to trial, the district court granted petitioner's motion for pretrial discovery of all the physical evidence which the government intended to introduce but denied, "at this time without prejudice" (Pet. App. B4), his motion to inspect the reports of tests made by government experts upon this physical evidence. At trial, the government introduced certain

[1] *Marron* v. *United States*, 275 U.S. 192, is not to the contrary. There, the warrant authorized seizure of intoxicating liquors and articles for their manufacture and did not specify the seizure of private books of account.

wires which F.B.I. agents testified were the same as or similar to wires found in petitioner's home. It also introduced the bell of the alarm clock which, testimony showed, had been marked by the vise seized from petitioner's home.

Petitioner, who did not renew his motion to inspect the reports after it was initially denied without prejudice, contends that the district court's ruling was erroneous because he had an absolute right to see the reports under Rule 16(a)(2) of the Federal Rules of Criminal Procedure. The court below, in a lengthy discussion of this issue (Pet. App. B3–B16) recognized that such inspection is generally held to be a matter of right, and stated that the trial court has "little, if any discretion" in denying such a motion. But the court also asserted, properly, that the trial court "has the power to control the chronology of discovery procedures." Since petitioner never renewed the discovery motion that had been left open in the interim ruling and did not object to the admission of evidence, the court properly held that there was no error requiring reversal.[8]

[8] The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is presently considering changing Rule 16(a)(2) to clarify whether government reports must be shown to defendants as a matter of right. The present rule provides that "[u]pon motion of a defendant the court may order" inspection of such reports. The proposal is to substitute "shall" for "may" in order to make "disclosure of the reports of examination and tests mandatory rather than discretionary with the judge" (Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for U.S. District Courts (Jan. 1970), pp. 43–58). This matter is appropriately resolved by the rule-making process.

3. In his petition for rehearing in the court below, petitioner contended he was denied effective assistance of counsel. His argument was based primarily on statements in the court of appeals' opinion with respect to trial counsel's handling of the discovery motions (Pet. App. B12). Petitioner renews this contention in this Court. Whatever were counsel's reasons for not pressing for discovery of the government's reports, however, his overall representation did not make the proceedings "a farce and a mockery of justice". See, *e.g.*, *United States* v. *Long*, 419 F. 2d 91, 94 (C.A. 5). For example, as the opinion below points out, counsel conducted effective cross-examination "directed to eliciting admissions from the scientific test witnesses that the tools and bomb fragments were mass produced, could be obtained anywhere and that crimp marks could have been made by a variety of tools, any of which were commercially available in large numbers. Cross-examination further elicited that the pieces of wire were not necessarily from a continuous coil of wire" (Pet. App. B11).

4. The claim that the voir dire examination was inadequate because the trial judge did not individually question each prospective juror, out of the presence of the others, with respect to pretrial publicity, also is answered by the opinion below (Pet. App. B22–B23). As the court points out, petitioner was afforded full opportunity to question the jurors. Moreover, available peremptory challenges were not exercised to exclude several jurors who had knowledge of the case (Pet. App. B23).

5. After the defense rested its case, counsel asked the government to disclose whether any evidence had been obtained by means of listening devices or electronic eavesdropping. The prosecutor advised "that there were no illegal eavesdropping devices" in this case (Pet. App. B31); he declined to state whether any eavesdropping equipment had been used at all (Tr. 931–941). On appeal, petitioner contended that the government should be required to disclose the existence of any electronic surveillance regardless of its view as to the legality of such surveillance. Petitioner argued that the case should be remanded for a determination of the legality of any eavesdropping. The government responded with a letter from the Criminal Division of the Department of Justice stating unequivocally that petitioner had not been the subject of direct microphone surveillance and that none of his conversations had been monitored.[4] Upon the basis of this letter, the court below declined to remand the cause, although it stated that it would have been preferable for the government to have supplied the pertinent information to the trial court. Its ruling thus is

[4] The full text of the letter is as follows:

This is in reply to your letter of October 30, 1969 requesting any electronic surveillance made on subject Cook in connection with his trial in your District.

Please be informed we have contacted the appropriate investigative agencies and have been informed Cook was *not* the subject of a direct microphone surveillance nor were any of his conversations monitored. Further, we are informed, no electronic surveillance was maintained on premises which were known to have been owned, leased, or licensed by the above individual.

correct under *Taglianetti* v. *United States*, 394 U.S. 316. Moreover, the steps taken below accord with the statutory procedures now provided with respect to claims of illegal electronic surveillance in proceedings occurring after October 15, 1970; we shall describe the new statutory procedures *infra*.

Congress has enacted two statutes that cover, in some detail, both the substantive and procedural aspects of electronic surveillance. The Omnibus Crime Control and Safe Street Acts of 1968, 82 Stat. 197, 212, now 18 U.S.C. (Supp. V) 2510–2520, established procedures for obtaining judicial warrants for electronic surveillance and for the preservation and disclosure of intercepted communications; that legislation specifically requires disclosure of the fact that oral or wire communications were intercepted under a warrant (18 U.S.C. 2518(8)(d)). Title VII of the Organized Crime Control Act of 1970, 84 Stat. 935 (set forth in the Appendix, *infra*), further provides specific rules for government disclosure with respect to all electronic surveillances; these rules apply to "all proceedings, regardless of when commenced, occurring after" October 15, 1970, the date of enactment of the 1970 Act. Under these statutory rules, the government is required to affirm or deny the existence of an ilegal electronic surveillance if and only if the defendant first raises a claim that the case against him is affected by such illegal activity.

In view of the statutory rule which now places upon a defendant the express burden of raising any issue of illegal electronic surveillance, it seems appropriate to conform the government's practice with the statute. Accordingly, the government is discontinuing the practice, announced in the supplemental brief in *Schipani* v. *United States*, No. 504, O.T. 1966, of initiating its own review of the files in each case to determine whether there was such surveillance which might have affected the case.[5] Instead, the government will now conduct such a review only when a claim is raised by a defendant, as the statutory rules provide.

The new statutory rules recognize the considerable administrative burden of conducting electronic surveillance reviews of each and every case brought to trial.[6] We believe that continued assumption of that burden is unwarranted in light of the changes in circumstances since the former review practice was instituted. The policy adopted in 1965 and the warrant procedures subsequently established in 1968 have, we believe, greatly reduced in recent years the instances in which arguably illegal electronic surveillance has occurred. In this connection, we observe that in the recent cases in which the government has notified the Court of illegal electronic surveillance, the immateriality of the information obtained has been so clear that the Court has not remanded the cases for hearings on the issue of taint. See our briefs in oppo-

[5] This policy was in accord with guidelines promulgated in a memorandum from the President on June 17, 1965, prohibiting electronic surveillance in all instances except for the collection of intelligence about matters affecting national security.

[6] See H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 92.

sition in *Lazarus* v. *United States*, No. 395, O.T., 1970, certiorari denied, October 19, 1970; *Gordon* v. *United States*, No. 1340, O.T., 1969, certiorari denied, 398 U.S. 927; *Teresa* v. *United States*, No. 1200, O.T. 1969, certiorari denied, 397 U.S. 1063; and our supplemental memorandum in *Moylan* v. *United States*, No. 885, O.T., 1969, certiorari denied, 397 U.S. 910.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

FEBRUARY 1971.

APPENDIX

ORGANIZED CRIME CONTROL ACT OF 1970, P.L. 91-452, 84 STAT. 922 *et seq.*

* * * * *

TITLE VII—LITIGATION CONCERNING SOURCES OF EVIDENCE

PART A—SPECIAL FINDINGS

SEC. 701. The Congress finds that claims that evidence offered in proceedings was obtained by the exploitation of unlawful acts, and is therefore inadmissible in evidence, (1) often cannot reliably be determined when such claims concern evidence of events occurring years after the allegedly unlawful act, and (2) when the allegedly unlawful act has occurred more than five years prior to the event in question, there is virtually no likelihood that the evidence offered to prove the event has been obtained by the exploitation of that allegedly unlawful act.

PART B—LITIGATION CONCERNING SOURCES OF EVIDENCE

SEC. 702. (a) Chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3504. Litigation concerning sources of evidence

"(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

"(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968,* or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

"(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

"(b) As used in this section 'unlawful act' means any act the [sic] use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

(b) The analysis of chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new item:

"3504. Litigation concerning sources of evidence."

SEC. 703. This title shall apply to all proceedings, regardless of when commenced, occurring after the date of its enactment. Paragraph (3) of subsection

*June 19, 1968, was the effective date of the Omnibus Crime Control and Safe Streets Act of 1968.

(a) of section 3504, chapter 223, title 18, United States Code, shall not apply to any proceeding in which all information to be relied upon to establish inadmissibility was possessed by the party making such claim and adduced in such proceeding prior to such enactment.

U.S. GOVERNMENT PRINTING OFFICE: 1971